No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The International Association of Machinists and Aerospace Workers, AFL-CIO, ("Machinists") submits this brief as *amicus curiae* in support of the respondents.[1]

INTEREST OF *AMICUS CURIAE*

The Machinists Union, founded in 1888 as a union representing railroad workers, is now among the largest industrial trade unions in North America, representing nearly 600,000 active and retired members in the railroad, airline, aerospace, woodworking, shipbuilding and manufacturing sectors organized in over 1000 local unions throughout the United States and Canada. The Machinists Union is one of the largest rail and airline workers' unions in the country, representing approximately 175,000 railroad and airline workers covered by the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (RLA). It also represents employees subject to the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, and public employees subject to a variety of state employment laws.

As one of the oldest and largest unions representing workers under the RLA, the Machinists Union has

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[1] Counsel for the petitioners and counsel for the respondents have consented to the filing of *amicus* briefs. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

been a party to or has participated in many of the seminal cases before this Court concerning the agency shop under the RLA. In particular, the Machinists Union (or one of the unions that through merger became part of the Machinists Union) was the one of the unions whose contracts were at issue in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), was the petitioner in *Machinists v. Street*, 367 U.S. 740 (1961), and the respondent in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), cases that defined the proper scope of agency shop provisions under the Railway Labor Act. Its current members, including those subject to the Railway Labor Act, the National Labor Relations Act, and various state laws governing public employees, have a vital interest in the outcome of this case.

SUMMARY OF ARGUMENT

Petitioner argues that this Court should overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in part because that case is an outlier that does not rest on sound First Amendment precedent. In particular, Petitioner asserts that *Abood* improperly and carelessly relied on *Hanson* and *Street*, two cases in which this Court rejected claims by railroad employees that they had a First Amendment right to refuse to pay servicing fees to the union that represented them pursuant to union shop provisions in the governing labor agreements. It also argues that *Hanson* and *Street* on their own terms are unsound. Both of these claims are mistaken.

Hanson and *Street* are cases that considered whether the Railway Labor Act's union shop provision, § 2, Eleventh, 45 U.S.C. § 152, Eleventh, violated the First

Amendment. In both of these cases, the Court held that the union shop provisions were lawful, but that the unions could not, over the objection of the employees they represent, collect fees for political and similar activities that are not germane to the unions' collective bargaining responsibilities. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), relied principally on those two decisions in holding that consistent with the First Amendment a union may charge nonmembers for the costs associated with activities germane to its collective bargaining duties, but not for certain activities such as political activities.

Petitioner relies on *dicta* in *Harris v. Quinn*, 573 U.S. __ (2014), questioning whether *Abood* had correctly relied on *Hanson* and *Street* in holding that consistent with the First Amendment a union may charge a non-member an agency fee. But *Abood's* reliance on those earlier decisions was sound. To be sure, the state action doctrine has evolved subsequent to the Court's decisions in *Hanson* and *Street*, so that it is no longer the case that the terms of the collective bargaining agreements between unions and private railroads would implicate the First Amendment, and for that reason, the Court's decision in this case will not directly implicate union shop agreements under the Railway Labor Act. However, *Hanson* and *Street* plainly and directly resolved the First Amendment claims brought in those cases, and did so in a manner that has been adopted not only in public sector union security cases, but also in cases challenging compulsory bar dues. And, while those cases' state action holdings are no longer good law, their First Amendment reasoning concerning the agency shop remains sound and fully consistent with contemporary First

Amendment jurisprudence. Petitioner's claims that these two cases are no longer legitimate First Amendment precedents, and that *Street* was not a First Amendment precedent to begin with, do not withstand scrutiny.

Hanson, on First Amendment grounds, reversed a holding of the Nebraska Supreme Court that a union shop provision violated the First Amendment, and held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First Amendment[]." 351 U.S. at 235. In so holding, it relied in part on what it understood to be the self-evident propostion that in the closely analogous context of bar dues, no one would seriously claim that state requirements that an attorney be a member of the state bar violated the First Amendment. *Ibid.* And, when the Court subsequently addressed the issue of the constitutionality of bar dues in in *Lathrop v. Donohue*, 367 U.S. 820 (1961), seven Justices treated the constitutionality of such a requirement as a foregone conclusion, relying on its First Amendment analysis in *Hanson*. When the issue of the constitutionality of required bar dues arose again in *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court once again rejected the First Amendment challenge based on the reasoning of *Hanson* and *Street*. *Hanson's* First Amendment holding concerning agency fees is sound, frequently relied upon by the Court, and has never seriously been questioned, until the Court's *dicta* in *Harris v. Quinn*.

Harris also criticized *Abood's* reliance on *Street*, on the ground that *Street* was decided on statutory grounds based on the doctrine of constitutional avoid-

ance, instead of directly on First Amendment grounds. But if there was ever a case in which a statutory decision based on constitutional avoidance provides unambiguous guidance on the Court's understanding of the First Amendment, it is *Street*.

The statute that *Street* construed to avoid a constitutional ruling was the agency shop provision of the RLA, section 2, Eleventh. The difficulty the Court avoided was that that provision, unlike the agency shop provision in the NLRA, on its face did not except from the reach of the compulsory agency fee monies used to fund a union's political expenditures (which the Court in *Hanson* already had ruled could *not* be assessed against the will of an objecting worker). In particular, the RLA agency shop provision expressly allowed the union to collect from all employees it represented "assessments" as well as "dues." And, in this regard, the legislative history of the RLA made it clear that "assessments" was intended to include charges to fund union political activities. This point was underscored by the previous enactment of the National Labor Relations Act, and its legislative history, where Congress *excluded* "assessments" from the reach of union security, and, as the legislative history of that Act made clear, did so precisely because it did not intend to allow unions under the NLRA to assess workers charges to fund political activities over the workers' objections. Yet when it later added a union shop provision to the RLA, Congress made a different decision and allowed unions to collect political "assessments."

Given that the Court since *Hanson* has consistently held that charges to fund political activities could not

be part of compulsory agency fees, and given that the RLA appeared to have authorized the collection of just such charges, the constitutional avoidance undertaken in *Street* was, to put it gently, "not without its difficulties," *Street*, 367 U.S. at 784-786 (Black, J., dissenting). For present purposes, it is enough to acknowledge that *Street* rested on the barest pretense of statutory construction and can only be explained, as the Court has consistently understood, as a decision describing "[t]he constitutional floor for unions' collection and spending of agency fees." *Davenport v. Washington Education* Ass'n, 551 U.S. 177, 185 (2007). It cannot be dismissed as a case having nothing to do with the First Amendment.

There is no sound basis to overrule *Abood*. It most certainly cannot be given the back of the hand on the mistaken assertion that it relied on carelessly reasoned or inapposite precedent.

ARGUMENT

"Consideration of the question whether an agency-shop provision in a collective-bargaining agreement covering governmental employees is, as such, constitutionally valid" *in Abood v. Detroit Board of Education*, 431 U.S. 209, 217 (1977), "beg[a]n with two cases . . . that on their face go far toward resolving the issue . . . *Railway Employes' Dept. v. Hanson*, [351 U.S. 225 (1956)], and *Machinists v. Street*, [367 U.S. 740 (1961)]." "Taken together *Hanson* and *Street* make clear that the local union cannot charge the nonmember for certain activities, such as political or ideological activities (with which the nonmembers may disagree)" but "can charge nonmembers for ac-

tivities more directly related to collective bargaining." *Locke v. Karass*, 555 U.S. 207, 213 (2009). "*Hanson*, *Street*, and *Abood*" have been understood to "set forth a general First Amendment principle: The First Amendment permits the government to require both public sector and private sector employees who do not wish to join a union designated as the exclusive collective-bargaining representative at their unit of employment to pay that union a service fee as a condition of their continued employment." *Ibid.* *See Ellis v. Railway Clerks*, 466 U.S. 435, 455-56 (1984) (citing *Abood*, *Street* and *Hanson* to establish that "[i]t has long been settled that such interference with First Amendment rights [as caused by the union shop] is authorized by the governmental interest in industrial peace").

In *Harris v. Quinn*, 573 U.S. ____ (2014), the majority opinion asserted that "[t]he *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union, [because] *Street* was not a constitutional decision at all, and *Hanson* disposed of the critical question in a single unsupported sentence." Slip op. 17.[2] Taking up each of

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[2] This criticism of *Abood* by the *Harris* majority opinion is plainly dicta. The holding of *Harris* was a refusal "to approve a very substantial expansion of *Abood's* reach" to cover "personal assistants" who were not "full-fledged public employees." *Id.* at 20. And this holding rested on the fact that in representing the nonemployee personal assistants "the union's powers and duties are sharply circumscribed," while "*Abood's* rationale, whatever its strengths and weaknesses, is based on the assumption that the union possesses the full scope of powers. . . under American labor law." *Id.* at 25.

these points separately, we show that *Abood* correctly looked to *Hanson* and *Street* for "guidance regarding what the First Amendment will countenance" with respect to public sector agency shop arrangements, precisely because those cases considered analogous First Amendment challenges to "a governmentally authorized union-shop agreement" under the Railway Labor Act. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 515 & 516 (1991).

I. *Hanson* Adequately Addressed the First Amendment Question the Court Found to be Presented by the Railway Labor Act's Authorization of Union Shop Agreements.

In *Hanson*, this Court reviewed a decision of the Nebraska Supreme Court that "held that the union shop agreement violates the First Amendment in that it deprives the employees of their freedom of association and violates the Fifth Amendment in that it requires the members to pay for many things besides the cost of collective bargaining." 351 U.S. at 230.[3] The principal question addressed by this

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[3] The Railway Labor Act, like the National Labor Relations Act, "permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the 'membership' that may be so required has been 'whittled down to its financial core.'" *Communications Workers v. Beck*, 487 U.S.735, 745 (1988), quoting *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). *See* 29 U.S.C. § 158(a)(3); 45 U.S.C. § 152, Eleventh(a). Thus, there is no legally effective difference between a "union shop" agreement requiring "membership" and an "agency shop" agreement requiring payment of an amount equal to membership dues. *See General Motors*, 373 U.S. at 743-44.

Court was whether the Railway Labor Act's authorization of such agreements raised "problems . . . under the First Amendment" in that "the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights." *Id.* at 236. Addressing this question, *Hanson* held that so long as "[t]he financial support required relates . . . to the work of the union in the realm of collective bargaining," *id.* at 235, "there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar," *id.* at 238. Thus, "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First . . . Amendment[]." *Ibid.*

In reaching this First Amendment question, the Court noted that "[t]he union shop provision of the Railway Labor Act is only permissive" and that "Congress has not compelled nor required carriers and employees to enter into union shop agreements." 351 U.S. at 231. "[N]evertheless," the Court found that "justiciable questions under the First and Fifth Amendments were presented since Congress, by the union shop provision of the Railway Labor Act, sought to strike down inconsistent laws in 17 States" so that "the federal statute is the source of the power and authority" for the "private agreement." *Id.* at 231-32. In other words, *Hanson* "found that the union's implementation of the union-shop provision amounted to state action" on the ground that "such clauses bore the imprimatur of federal law." *White*

v. Communications Workers Local 13000, 370 F.3d 346, 352 (3d Cir. 2004).

In subjecting the union shop agreements authorized by the Railway Labor Act to First Amendment scrutiny on that ground, *Hanson* relied upon *Public Utility Comm'n v. Pollak*, 343 U.S. 462-63 (1952). *See Hanson*, 351 U.S. at 232. *Pollak*'s holding that governmental permission is sufficient to subject private conduct to First Amendment scrutiny is out of line with the current state action analysis. *See, e.g., American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53-54 (1999). To that extent, *Hanson* is no longer a viable state action precedent. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 362 (1974) (Douglas, J., dissenting) (citing *Hanson* as contrary to the majority opinion) & 366-67 (Marshall, J., dissenting) (same). Be that as it may, *Abood* correctly understood that "the union shop, as authorized by the Railway Labor Act, . . . was found to result from governmental action in *Hanson*," and "[t]he plaintiffs' claims in *Hanson* failed, not because there was no governmental action, but because there was no First Amendment violation." 431 U.S. at 226.

The majority opinion in *Harris* does not criticize *Abood* for treating *Hanson* as a First Amendment precedent, so much as it criticizes *Hanson*'s "dismiss[al of] the objecting employees' First Amendment argument with a single sentence" finding "'no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.' *Id.* at 238." Slip op. 11. The *Harris* majority opinion finds "[t]his explanation. . .

remarkable for two reasons," *ibid.*, both of which concern *Hanson*'s treatment in *Lathrop v. Donohue*, 367 U.S. 820 (1961).

The first "remarkable" point noted by the *Harris* majority is that "the Court had never previously held that compulsory membership in and the payment of dues to an integrated bar was constitutional" and when "that issue did . . . reach the Court . . . five years later, . . . it produced a plurality opinion and four separate writings. *See Lathrop v. Donohue*, 367 U.S. 820 (1961) (plurality opinion)." Slip op. 11. The truly "remarkable" thing, however, is that when this issue did reach the Court in *Lathrop*, seven of the Justices treated "the constitutionality of such a requirement []as . . . a foregone conclusion," *ibid.*, with six of those Justices relying solely on the analogy between the integrated bar and the union shop drawn in *Hanson*. *Lathrop*, 367 U.S. at 842-43 & 849-50. *See Keller v. State Bar of California*, 496 U.S. 1, 7-9 (1990) (discussing *Lathrop*'s reliance on *Hanson*).

Justice Brennan's plurality opinion in *Lathrop* stated that "the case presents a claim of impingement upon freedom of association no different from that which we decided in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225," and, after quoting the sentence from *Hanson* singled out for criticism by the *Harris* majority, he concluded that, "[g]iven the character of the integrated bar shown on this record, . . . we are unable to find any impingement upon protected rights of association." 367 U.S. at 842 & 843. Justice Harlan's concurring opinion stated, likewise, that "[t]he *Hanson* case . . . surely lays at rest all doubt that a State may Constitutionally condition the right to prac-

tice law upon membership in an integrated bar." *Id.* at 849.[4] Justice Black agreed that "the question posed" by the "integrated bar" is "identical to that posed" by the union shop but dissented on the ground that both are unconstitutional. *Id.* at 871.

The second "remarkable" point noted by the *Harris* majority is that "in his *Lathrop* dissent, Justice Douglas, the author of *Hanson*, came to the conclusion that the First Amendment *did not permit* compulsory membership in an integrated bar" and that "[t]he analogy drawn in *Hanson*, he wrote, fails." Slip op 11. Justice Douglas was alone in rejecting the analogy he had drawn in *Hanson*. But even so, Justice Douglas expressly reaffirmed *Hanson*'s ruling that "Congress has the power to permit a union-shop agreement that exacts from each beneficiary his share of the cost of getting increased wages and improved working conditions" and then added that "[t]he power of a State to manage its internal affairs by requiring a union-shop agreement would seem to be as great." *Lathrop*, 367 U.S. at 879.

When the Court returned to the constitutionality of the integrated bar in *Keller*, it once again relied upon the "substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other" and refused to "distinguish the two situations on the grounds that the compelled association in the context of labor unions serves only a private economic interest in collective

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[4] Justice Whittaker concurred on separate grounds. *Id.* at 865.

bargaining, while the State Bar serves more substantial public interests." 496 U.S. at 12 & 13. As Chief Justice Rehnquist explained, in his opinion for a unanimous Court, "agency shop arrangements . . . serve substantial public interests as well," and "[w]e are not possessed of any scales which would enable us to determine that the one outweighs the other sufficiently to produce a different result here." *Id.* at 13.

In sum, on both occasions when the Court directly addressed the extent to which "compulsory membership in and the payment of dues to an integrated bar [i]s constitutional," *Harris*, slip op. 11, the Court expressly endorsed and relied upon *Hanson*'s analogy with the RLA's authorization of union shop agreements. The assertion that the Court has not previously given serious consideration to First Amendment objections to compulsory fee arrangements does not withstand scrutiny.

II. *Abood* Correctly Looked to *Street* for Guidance with Respect to the Requirements of the First Amendment.

The *Harris* majority criticizes *Abood*'s reliance on *Street* in "decid[ing] the constitutionality of compulsory payments to a public sector union" on the grounds that "*Street* was not a constitutional decision at all." Slip op. 17. It is true that *Street* "construed the RLA . . . 'to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes.'" *Id.* at 13, quoting *Street*, 367 U.S. at 768-69. But, as the *Harris* majority recognized, *Street* did so, only to

avoid "constitutional questions 'of the utmost gravity.'" *Ibid.*, quoting *Street*, 367 U.S. at 749.

As *Abood* puts the same point, "*Street* embraced an interpretation of the Railway Labor Act not without its difficulties, see 367 U.S. at 784-786 (Black, J., dissenting); *id.* at 799-803 (Frankfurter, J., dissenting), precisely to avoid facing the constitutional issues presented by the use of union-shop dues for political and ideological purposes unrelated to collective bargaining, *id.* at 749-50." *Abood*, 431 U.S. at 232. This is something of an understatement, because the holding in *Street* rests on the barest pretense of statutory construction and can only be explained as an attempt to describe what the Court considered to be "[t]he constitutional floor for unions' collection and spending of agency fees." *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 185 (2007).

Street held that "§ 2, Eleventh [of the Railway Labor Act] is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." 367 U.S. at 768-69. The Court had no constitutional concern "as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes." *Ibid.*

The language of RLA § 2, Eleventh contains not the slightest suggestion that employees covered by a permitted union shop agreement can opt out of paying any portion of the union dues, fees and assessments uniformly paid by union members. To the contrary, the statute states that covered employers

and unions may enter into agreements requiring employees to "become members of the labor organization representing their class or craft" by "tender[ing] the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." 45 U.S.C. § 152, Eleventh(a). By providing that all covered employees must "tender the periodic dues, initiation fees, and assessments . . . *uniformly* required as a condition of acquiring or retaining membership" and excluding from the required exactions only "fines and penalties," the terms of § 2, Eleventh make it exceedingly clear that the amount that must be tendered is the full amount an employee would have to pay to become and remain a member of the union.

At the time it amended the Railway Labor Act to add § 2, Eleventh, "Congress was well aware of the broad scope of traditional union activities," because during the 1950 hearings on the amendment, "Congress was adequately informed about the broad scope of union activities aimed at benefitting members." *Ellis*, 466 U.S. at 446. Thus, as this Court aptly observed, "in light of the absence of express limitations in § 2, Eleventh it could plausibly argued that Congress purported to authorize the collection from involuntary members of the same dues paid by regular members." *Ibid.*

Inclusion of the term "assessments" in the phrase "periodic dues, initiation fees, and assessments" is particularly significant in this regard, because that term has a special meaning in the labor context that explains its absence from the second proviso to

§ 8(a)(3) of the National Labor Relations Act, as amended in 1947, on which RLA § 2, Eleventh was modeled. *See Communications Workers v. Beck*, 487 U.S. at 745. "An assessment," in labor law parlance, "is a charge levied on each member in the nature of a tax or some other burden for a special purpose, not having the character of being susceptible of anticipation as a regularly recurring obligation as in the case of 'periodic dues.'" *NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 11 (3d Cir. 1962). *See, e.g., Knox v. Service Employees*, 567 U.S. ___ (2012), slip op. 4 (involving an "Emergency Temporary Assessment to Build a Political Fight-Back Fund."). The NLRA proviso limits its authorization of union security agreements to requiring payment of "periodic dues and the initiation fees," 29 U.S.C. § 158(a)(3), and the legislative history demonstrates that the omission of "assessments" was a conscious decision reflecting Congress's understanding of that term.

A cause celebre during the debates over the 1947 union security amendments to the NLRA was the case of Cecil B. DeMille, who "was forced to join a union in order to be able to appear on the radio" and was not allowed to "make any further broadcasts on the radio, simply because . . . he refused to pay the assessment made on him" by the union "to fight a cause he did not believe." 2 NLRB, Leg. Hist. of the LMRA 1061-62 (1948).[5] Senator Taft explained that this sort

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[5] DeMille was discharged from employment for refusing to pay a $1 special assessment levied by the union for the purpose of opposing an initiative that would have outlawed union security agreements in California. *See DeMille v. American Federation of Radio Artists*, 31 Cal.2d 139, 187 P.2d 769 (1947).

of problem would be addressed by the second proviso which "is substantially the rule now in effect in Canada" drawn from "a decision of the justices of the Supreme Court of Canada in an arbitration case." *Id.* at 1422. The decision referred to by Senator Taft was that of Justice I.C. Rand in *Ford Motor Co. of Canada*, 1 BNA Arb. Rep. 439 (1946). The theory of the "Rand formula," which allows nonmembers to be required to pay "dues," but not "a special assessment," *id.* at 445, was that "payment of regular union dues, not including initiation fees and assessments, would be an approximately fair 'service fee,' which would not seriously involve nonmembers in the payment for political or other union purposes of which they did not approve." Dudra, *Approaches to Union Security in Switzerland, Canada and Colombia*, 86 Monthly Lab. Rev. 136, 138 (1963).

In drafting the 1947 amendments to the union security provisions in the NLRA, Congress deliberately tracked "the rule now in effect in Canada," 2 Leg. Hist. of LMRA 1422, by allowing a requirement that nonmembers pay "regular union dues"—but not "assessments"—as a means of "not seriously involv[ing] nonmembers in the payment for political or other union purposes of which they did not approve," Dudra, 86 Monthly Lab. Rev. at 138. Yet, three years later, in adding § 2, Eleventh to the RLA, Congress expressly authorized requiring nonmembers to pay not just "the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining [union] membership," 29 U.S.C. § 158(a)(3), but "the periodic dues, initiation fees, and *assessments* (not including fines and penalties) uniformly required as a condition of acquiring or retaining mem-

bership," 45 U.S.C. § 152, Eleventh(a) (emphasis added). The inclusion of the term "assessments" in RLA § 2, Eleventh gives the strongest possible indication that Congress meant to authorize agreements that require nonmembers to pay all of the various types of charges "uniformly required" of union members, with the sole exception of "fines and penalties."

Street's "hold[ing] . . . that § 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes he opposes," 367 U.S. at 768-69, is the culmination of a long section of the opinion headed, "THE SAFEGUARDING OF RIGHTS OF DISSENT," *id.* at 765. *See id.* at 765-70. From a careful examination of § 2, Eleventh's legislative history, *Street* found that "[a] congressional concern over possible impingement on the interests of individual dissenters from union policies is . . . discernible." *Id.* at 766. That background allowed the Court to conclude that "Congress incorporated safeguards in the statute to protect dissenters' interests." *Id.* at 765. On that basis, the Court asserted that it was only "respect[ing] this congressional purpose when [it] construe[d] § 2, Eleventh as not vesting the unions with unlimited power to spend exacted money" and as "denying the unions the rights, over the employee's objection, to use his money to support political causes which he opposes." *Id.* 768.[6]

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[6] The proposition that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee," *Street*, 367 U.S. at 774, thus was an essential aspect of *Street*'s "hold[ing] . . . that [RLA] § 2, Eleventh is to be construed to deny the unions, over an employee's objection,

The *Street* majority relied entirely on the addition of the proviso concerning "periodic dues, initiation fees, and assessments" as the source of the RLA's "safeguards . . . protect[ing] dissenters' interests." 367 U.S. at 765. But, as we have demonstrated, it is this very proviso that indicates Congress's intent to allow a requirement that all employees pay the full amounts "uniformly required" as a condition of full union membership. It is, therefore, quite clear that the proviso was intended to protect "opponents of the unions" or "dissatisfied member[s]" from losing their jobs as a result of expressing "criticism" of the union. *Id.* at 802 (dissenting opinion). But that protection was intended to have no effect on the union's ability to require that all employees pay full dues, initiation fees and assessments.

In short, *Street*'s construction of RLA § 2, Eleventh can only be understood as the majority's understanding of what the First Amendment required with respect to the application of the authorized union security agreements. As Justice Frankfurter's dissenting opinion demonstrates, 367 U.S. at 806-07, the majority's perception of a First Amendment problem in this private conduct was most likely contrary to contemporary state action analysis. It is certainly contrary to modern state action analysis. Regardless of

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the power to use his exacted funds to support political causes which he opposes," *id.*, at 768-69. Accordingly, the characterization of this aspect of the *Street* opinion as "dicta" and nothing more than an "offhand remark" made "in passing" in *Knox v. Service Employees*, 567 U.S. ___ (2012), slip op. 12-13, is incorrect. As *Knox* did not concern the interpretation of the Railway Labor Act, its description of *Street* is dicta.

whether *Street* erred in discerning a need to apply the First Amendment, *Abood* correctly understood that opinion as setting "[t]he constitutional floor for unions' collection and spending of agency fees," *Davenport v. Washington Education Ass'n*, 551 U.S. at 185, in those instances where the First Amendment does apply.

This Court does not lightly overturn a long and consistent series of its own decisions. It should not do so here by giving them the back of its hand by asserting that they were careless enacted based on misreadings of earlier Court decisions, because that is simply not the case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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